

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Duluth PCS, Inc., and St. Joseph PCS, Inc.
Request for Partial Waiver of Section 1.2110(g) of
the Commission's Rules

ORDER

Adopted: April 26, 2004

Released: April 26, 2004

By the Chief, Auctions and Spectrum Access Division:

I. INTRODUCTION

1. This Order denies the request of Duluth PCS, Inc. and St. Joseph PCS, Inc. (referred to collectively with their parent company, TriCo Wireless PCS, Inc., as "TriCo") for relief from their installment payment obligations pursuant to Section 1.2110(g) of Commission's rules. TriCo seeks partial waiver, tolling, or temporary suspension of the final deadline for installment payments originally due on October 31, 2003, for the two broadband Personal Communications Service (PCS) C block licenses covering Basic Trading Area ("BTA") 119 (Duluth, Minnesota) and BTA 393 (St. Joseph, Missouri), respectively. Absent payment in full of the installment payments and all applicable late fees on or before the April 30, 2004, final deadline, or grant of TriCo's Request, the two licenses will cancel automatically. For the reasons detailed below, we conclude that the public interest is served by enforcing the deadline established by the Commission's rules and deny TriCo's Request.

II. BACKGROUND

2. TriCo has been paying the winning bids for the Duluth and St. Joseph licenses in installments

1 See Duluth PCS, Inc. and St. Joseph PCS, Inc., Expedited Request for Partial Waiver of Section 1.2110(g) of the Commission's Rules or Alternatively, Tolling of the Installment Payment Deadline Date or Alternatively, Temporary Suspension of the Installment Payments; filed March 5, 2004 ("TriCo Request"). TriCo Wireless PCS, Inc. is the holding company for Duluth PCS, Inc., and St. Joseph PCS. TriCo Request at 2. In addition to the original TriCo Request, we also have considered the Errata filed on March 11, 2004, the Supplement filed on March 11, 2004, and the Supplement filed on April 16, 2004, in support of TriCo's Request.

2 See TriCo Request.

3 See 47 C.F.R. § 1.2110(g)(4)(iv).

pursuant to the Commission's installment payment rules.⁴ However, the quarterly payments originally due on October 31, 2003, have not been paid.⁵ The Commission's installment payment rules grant licensees up to two consecutive grace periods of one quarter (three months) each to make an installment payment after the original payment due date, subject to payment of applicable late fees.⁶ If a licensee fails to submit the installment payment and all applicable late fees by the end of the second grace period, it is considered to be in default on its installment payment obligations, and its license automatically cancels.⁷ Accordingly, in order to avoid automatic cancellation of the Duluth and St. Joseph licenses, payments that were due for those licenses on October 31, 2003, together with all associated late fees, must be paid on or before April 30, 2004.

3. Pursuant to Sections 1.3 and 1.925 of the Commission's rules, TriCo seeks relief from the April 30, 2004, final deadline.⁸ TriCo has applied to the Rural Utilities Service (RUS) of the United States Department of Agriculture for a loan and asserts that it needs the loan in order to meet its installment payment obligations and continue operating.⁹

⁴ RLV-PCS I Partnership ("RLV") won the two broadband PCS C Block licenses at issue in Auction No. 5. See *Entrepreneurs' C Block Auction Closes*, *Public Notice*, DA 96-716 (May 8, 1996), Attachment A at 3 (BTA 119) and 9 (BTA 393). RLV certified that it qualified to pay its winning bids in Auction No. 5 in installments pursuant to the Commission's rules, and elected to do so. Subsequently, RLV transferred these two licenses to, respectively, Duluth PCS, Inc., and St. Joseph PCS, Inc. See FCC Wireless Telecommunications Bureau Application for Assignments of Authorization and Transfers of Control (FCC 603) ("FCC Form 603"), File No. 50105CWAL97 (Commission consent to transfer broadband PCS C Block licenses for BTA 119 to Duluth PCS, Inc. granted 5/23/97, transfer consummated 2/16/98) and FCC Form 603, File No. 50104CWAL97 (Commission consent to transfer broadband PCS C Block licenses for BTA 393 to St. Joseph PCS, Inc. granted 5/23/97, transfer consummated 2/16/98). (All FCC Forms 603 Files referenced herein are publicly available through the Commission's Universal Licensing System website, <http://wireless.fcc.gov/uls/>). Subsequently, the owners of Duluth PCS, Inc., and St. Joseph PCS, Inc., executed a *pro forma* transfer of both companies to the owners' holding company, TriCo Wireless PCS, Inc. See FCC Form 603, File No. 0000313705 (Commission consent to *pro forma* transfer of control of Duluth PCS, Inc. to TriCo Wireless, PCS, Inc granted 3/29/01, transfer consummated 4/1/01) and FCC Form 603, File No. 0000313723 (Commission consent to *pro forma* transfer of control of St. Joseph PCS, Inc. to TriCo Wireless, PCS, Inc. granted 3/29/01, transfer consummated 4/1/01). Duluth PCS, Inc. and St. Joseph PCS, Inc. have certified that they qualify to pay RLV's winning bids for the licenses in installments, pursuant to the Commission's rules.

⁵ See TriCo Request and supporting materials.

⁶ 47 C.F.R. § 1.2110(g)(4)(i)-(ii).

⁷ 47 C.F.R. § 1.2110(g)(4)(iv).

⁸ TriCo states that it "requests that its installment payment obligations for its October 2003 payment be delayed for another six months [beyond the two consecutive quarters of automatic grace pursuant to the Commission's rules] until October 2004." TriCo Request at 2. We note that TriCo must submit the installment payments that came due on January 31, 2004 and all applicable late fees on or before July 31, 2004, *i.e.*, during the six months of relief requested by TriCo.

⁹ TriCo Request at 4.

III. DISCUSSION

4. We deny TriCo's Request. Section 1.3 of the Commission's rules, a general waiver provision, states, in relevant part, that "[a]ny provision of the rules may be waived by the Commission . . . on petition if good cause therefore is shown."¹⁰ Section 1.925 details circumstances that may merit waiving the Commission's wireless telecommunications licensing rules, *i.e.*, section 1.925 specifies what may constitute "good cause" with respect to those rules.¹¹ Section 1.925 allows grant of a waiver if it can be shown either that (i) application of the rule would not serve, or would frustrate, its underlying purpose, or (ii) in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹² We discuss TriCo's waiver request below according to the more detailed criteria of Section 1.925; however, we reach the same conclusion under Section 1.3's broader statement of the same standard.¹³

5. With regard to the first prong of the Section 1.925 waiver standard, TriCo argues that enforcing the April 30, 2004 final deadline will not serve, and would frustrate, the underlying purposes of the Commission's installment payment rules. TriCo acknowledges that an underlying purpose of those rules is to preserve the integrity of the Commission's auction process in order to ensure that spectrum is awarded to those financially qualified bidders who value it the most.¹⁴ The Commission has explained that the purpose of the installment payment and automatic license cancellation rule is to enhance the integrity of the Commission's competitive bidding and licensing process.¹⁵ Consistent enforcement of the requirements of Section 1.2110(g) minimizes bidders' incentives to make bids that they will not be able to pay and thereby enhances the likelihood that competitive bidding will assign licenses to the qualified licensees that most highly value them and will put them to their highest use.¹⁶ TriCo suggests that

¹⁰ 47 C.F.R. § 1.3.

¹¹ 47 C.F.R. § 1.925.

¹² 47 C.F.R. § 1.925.

¹³ See *Access 220, LLC, Order on Reconsideration*, DA 03-3613 ("there is no substantive difference between the waiver standard enunciated under Section 1.925 and Section 1.3 of the Commission's Rules") (citing *Application For Review of BellSouth Wireless, Inc., Memorandum Opinion and Order*, 12 FCC Rcd 14031, 14037-38 ¶ 11 (1997), *aff'd in relevant part, BellSouth v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999)).

¹⁴ TriCo Request at 23.

¹⁵ *Southern Communications MO&O*, 15 FCC Rcd at 25,110-11, ¶ 15; *21st Century MO&O*, 15 FCC Rcd at 25,117-18, ¶ 10. See also *Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly, Public Notice*, 11 FCC Rcd 10,853 (1996). "Allowing bidders to adjust their bids post-auction would encourage insincere bidding and therefore interfere with the Commission's goal to ensure that licenses are auctioned to those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service." Letter to James A. Stenger, Esq., Counsel for Allen Leeds, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 17,621, 17,623 (2001) (citing *Application for Assignment of Broadband PCS Licenses, FCC 98-301, Order*, 14 FCC Rcd 1126, ¶ 1 (1998)).

¹⁶ See *Request of GLH Communications, Inc. for Temporary Waivers of Installment Payment Deadlines* (47 C.F.R. § 1.2110(g)(4)) and *Debt Collection Rules* (47 C.F.R. § 1901 et seq.), DA 03-2368, *Order*, 18 FCC Rcd 14,695 (2003) (reconsideration pending) ("*GLH Order*").

circumstances demonstrate that it is the qualified licensee that most highly values the license and will put it to its highest use and that therefore enforcing the final deadline for payment is unnecessary and counter-productive. We do not find TriCo's arguments persuasive.

6. First, TriCo claims that its history of making past payments and seeking financing demonstrates that it is financially qualified to be a licensee.¹⁷ Second, TriCo argues that its qualifications as a licensee are further demonstrated by the service it provides, which it contends fulfills several public interest goals and Commission policies. TriCo asserts that it has built out the two licenses in advance of Commission's construction deadlines and is currently providing service to at least 1300 subscribers, many of whom reside in rural areas and on tribal lands.¹⁸ TriCo claims that more than half of its subscribers report that they use TriCo as their sole telephone service.¹⁹ According to TriCo, enforcement of the April 30, 2004, final deadline would "negate all of TriCo's accomplishments."²⁰ Finally, TriCo argues that upon cancellation of its licenses, the spectrum may remain unused for years.²¹

7. We find TriCo's arguments insufficient to demonstrate that enforcing the April 30, 2004 final deadline would frustrate the purposes of the Commission's installment payment rules. We addressed an analogous situation in *GLH*, where a licensee seeking an installment deadline waiver asserted that it had demonstrated its financial capacity by having built out a system without assuming debt other than that owed to the Commission for the license.²² Denying *GLH*'s waiver request, we explained that a licensee's qualifications and ability to make some use of licenses cannot protect the integrity of the auction that initially assigned the licenses and does not justify waiver of the installment payment deadline and automatic cancellation rule.²³ Moreover, we noted that notwithstanding a history of making payments, *GLH* still owed more than 70 percent of the total due under the installment payment plan.²⁴ In the case now before us, TriCo still owes nearly 75 percent of its net high bids and admits that it has not yet generated a positive cash flow.²⁵ TriCo's other assertions – that it has built out its licenses, is providing service, and is serving rural and tribal subscribers – are similarly insufficient to satisfy the waiver standard. As we noted in *GLH*, where the licensee claimed to be serving more than 14,000 rural and low-income subscribers, the public interest in the provision of service does not, by itself, outweigh the public interest in preserving auction and licensing integrity.²⁶ Instead, the public interest in a particular

¹⁷ See, e.g., TriCo Request at 24.

¹⁸ See TriCo Request at 2-5, 24.

¹⁹ *Id.* at 5-6, 24.

²⁰ *Id.* at 34-35.

²¹ *Id.* at 36.

²² *GLH Order*, 18 FCC Rcd at 14,699, ¶11.

²³ *Id.*

²⁴ *Id.* at 14,701, ¶16.

²⁵ TriCo Request at 10.

licensee's providing service must be balanced against the larger public interest in preserving the integrity and efficiency of the Commission's licensing process, as well as the Commission's obligation to fairly and consistently enforce its payment rules.²⁷ Finally, we believe that preserving the integrity and efficiency of the licensing process better serves the rapid deployment of sustainable service in all areas, including rural areas and tribal lands, than ad hoc waiver of the Commission's installment payment rules premised on speculation about the time it may take to re-license spectrum should licenses be cancelled.

8. Similarly, TriCo's attempt to satisfy the second, alternative prong of the waiver standard is unpersuasive. TriCo contends that enforcement of the final deadline and automatic license cancellation rule would be inequitable, unduly burdensome, and contrary to the public interest. TriCo suggests that its circumstances are unique in that it provides service to rural areas and tribal lands with low telephone service penetration rates and that more than half of its subscribers use TriCo as their sole telephone service. TriCo also states that where it has competition, it provides service at rates generally considerably lower than the competition's.²⁸

9. The Commission has concluded that circumstances very similar to TriCo's do not justify waiver of an installment payment deadline. In *SouthEast*, the Commission denied requests for such a waiver by two companies providing service in rural areas,²⁹ even though one of the companies served numerous subscribers on an Indian reservation that had never before had wireless coverage³⁰ and the other planned service to an area with a telephone penetration rate well below the national average.³¹ More recently, in *GLH*, we determined that the public interest in the provision of service to more than 14,000 rural and low-income customers was not sufficient to justify a waiver of the Commission's installment payment rules.³² As we stated, "[a]ny interest in a particular licensee[s] providing service must be balanced against the larger public interest in preserving the integrity and efficiency of the Commission's licensing process, as well as the Commission's obligation to fairly and consistently enforce its payment rules."³³ Our decision in *GLH* was, we note, unaffected by the licensee's assertion that it was offering

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²⁶ *GLH Order*, 18 FCC Rcd at 14,699-700, ¶12; Request for Extensions of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22,071, 22,077 (1998) (discussing service provided by two licensees denied waivers of the installment payment and automatic cancellation rules) ("*SouthEast Order*").

²⁷ *GLH Order* at 14,699-700, ¶12. TriCo points to the waivers of buildout deadlines granted by two other divisions of the Wireless Telecommunications Bureau in the *Magnacom* and *PinPoint* decisions as precedent for granting its request. Because the Commission has never determined whether to grant an installment deadline waiver request according to the criteria used in evaluating requests for waivers of construction benchmark requirements, we consider this precedent inapposite.

²⁸ TriCo Request at 3, 6.

²⁹ See *SouthEast Order*.

³⁰ *SouthEast Order*, 13 FCC Rcd at 22,076-078 (dissenting statement).

³¹ *Id.*

³² *GLH Order*, 18 FCC Rcd at 14,698-700, ¶¶8-12.

³³ *GLH Order*, 18 FCC Rcd at 14,699-700, ¶12.

service at below-average prices.³⁴

10. TriCo also contends that its situation is unique because of its pending RUS loan application. TriCo asserts that it needs only temporary relief from the installment payment rules because its RUS application is at an “advanced and active processing stage.”³⁵ However, in denying the installment deadline waiver request in *GLH*, we explained that the temporary nature of a request for waiver does not alter the standard to be applied to such a request.³⁶ The Commission has found the expectation of financing to be insufficient grounds for grant of even a short-term installment deadline waiver. In *SouthEast*, the Commission denied a request for a two-month installment deadline waiver, despite the licensee’s anticipated receipt of additional financing within the next 60 days.³⁷ We noted last year in our denial of an installment deadline waiver request that the licensee had offered neither “a definitive time-frame nor any assurance for when it [would] be able to pay for its licenses.”³⁸

11. TriCo further contends that its service to rural areas, which is the basis for its effort to qualify for an RUS loan, merits granting it the requested relief from the Commission’s installment payment rules.³⁹ As discussed above, however, the provision of service to rural areas does not constitute the type of unique circumstance that would support waiving the Commission’s rules. Consequently, TriCo’s asserted qualification for public financing to provide such service also is not sufficient grounds to waive those rules.

12. TriCo also complains that economic problems plaguing the wireless industry in recent years have made it difficult for TriCo to obtain additional financing and have slowed the growth of its business.⁴⁰ According to TriCo, unforeseen regulatory burdens, such as having to comply with requirements associated with E-911, the Universal Service Fund, CALEA (Communications Assistance for Law Enforcement Act), and Local Number Portability, have added to its unsatisfied need for additional capital.⁴¹ The challenge of raising capital to finance a license does not constitute a unique fact

³⁴ See *GLH Order* at 14,699, ¶11.

³⁵ TriCo Request at 3-4.

³⁶ *GLH Order* at 14,698, ¶7.

³⁷ See *SouthEast Order*, 13 FCC Rcd at 22,071-72, ¶2, and 22,076-078 (dissenting statement).

³⁸ Letter to Mr. John Jung, Jung on Jung, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 03-2273, 18 FCC Rcd 14,427, 14,430 (2003) (“*Jung on Jung Letter*”)

³⁹ TriCo claims that it submitted its RUS financing application with the advice and encouragement of Commission staff and that, therefore, equity requires grant of its waiver request. TriCo Request at 39. We need not consider the accuracy of TriCo’s claims because even if true they would not provide a basis for granting TriCo’s Request. Any such communications with Commission staff cannot preclude enforcement of the Commission’s rules. *Office of Personnel Management v. Richmond*, 497 U.S. 1046 (1990); see Letter to James A. Stenger from Margaret Wiener, DA 01-2266 (rel. October 2, 2001) (applying *Richmond* and citing other Commission precedent also doing so).

⁴⁰ See TriCo Request at 19-22.

⁴¹ TriCo Request at 15-16.

or circumstance that justifies a waiver of an installment payment deadline.⁴² More specifically, we have decided that the effects of an economic downturn and a decline in financial markets are not grounds for grant of an installment deadline waiver.⁴³ As we have observed in the past, in choosing to become a licensee and agreeing to pay by installments, an installment debtor accepts the risk that its assumptions regarding the availability of capital might prove incorrect.⁴⁴ TriCo's arguments do not persuade us to deviate from that precedent.

13. Finally, TriCo argues that cancellation of its licenses would harm "innocent investors" in TriCo and thereby discourage future investment.⁴⁵ TriCo's argument incorrectly equates relief for its investors with the Commission's policy of encouraging and facilitating investment in wireless services generally. Consistent enforcement of the Commission's rules is the best method of creating the stability that will facilitate investment in Commission licensees. In most cases, licensees paying for broadband PCS licenses under the Commission's installment payment program have obtained funding from outside investors.⁴⁶ In *SouthEast*, the Commission was unmoved by an installment payor's claim that it could not fulfill both its obligation to the Commission and its obligation to its private creditor.⁴⁷ We are similarly unpersuaded by TriCo's argument here.

III. CONCLUSION AND ORDERING CLAUSES

14. For the reasons above, the requirements for waiver of the Commission's installment payment deadline and automatic license cancellation rule, Section 1.2110(g)(4),⁴⁸ have not been satisfied.

15. Accordingly, IT IS ORDERED that the relief requested in TriCo's Request, filed March 5, 2004, is DENIED.

16. IT IS FURTHER ORDERED that a copy of this ORDER shall be sent to TriCo Wireless PCS, Inc., and its attorneys, by certified mail, return receipt requested.

⁴² See *SouthEast Order*, 13 FCC Rcd at 22,072-73, ¶4.

⁴³ See *Jung on Jung Letter*; Letter to Messrs. Stephen Diaz Gavin and Paul C. Besozzi, Counsel for U.S. Telemetry Corporation, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 02-819, 17 FCC Rcd 6442, 6446 (2002) ("*U.S. Telemetry Corporation Letter*").

⁴⁴ *U.S. Telemetry Corporation Letter*, 17 FCC Rcd at 6446-47.

⁴⁵ TriCo Request at 39-40.

⁴⁶ See *SouthEast Order* at 22,072, ¶4. ("The challenge of raising capital to finance C and F block licenses exists in varying degrees for all licensees and does not constitute 'unique fact and circumstances.'")

⁴⁷ See *SouthEast Order*, 13 FCC Rcd at 22,071-72, ¶2.

⁴⁸ 47 C.F.R. § 1.2110(g)(4).

17. This action is taken pursuant to Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), under authority delegated pursuant to Section 0.331 of the Commission's rules.⁴⁹

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⁴⁹ 47 C.F.R. § 0.331.